



## BRUSSELS À JOUR

# La Rentrée 2022 – Things to Have on Your Radar after the Summer Break (Day 1)

Markus Roehrig, Laura Stoicescu and Joachim Burger report on the latest developments from the European capital of competition law..

Now, that the first post-Covid summer has come and gone, it's time to put up your surf board, pack the kids' lunch boxes and plan for the months ahead. Admittedly, we can't rival with the masters of bento boxes, but we can give you a short overview of "les must" of this fall in terms of antitrust, cartels, merger control, foreign subsidies and State aid. Stay with us, for our second issue of La Rentrée, keeping you company for the next three days. To kick off, in today's instalment, we will be looking at what lies ahead in terms of Antitrust and Cartels.

### Antitrust: Horizontal Block Exemption Regulation

With the expiry of the current rules due for the end of the year, and the public consultation process already concluded in April, it looked for a while that it was smooth sailing for the last stretch of the procedure. Only it is not, as far as the R&D part is concerned. Just a few days ago, the Commission announced that it was considering extending the Horizontal Block Exemption Regulation ("HBER") rules, pending additional reflection on the new framework. It appears that the market feedback on issues such as mobile network sharing and sustainability rules has been quite critical. For the moment, it is unclear until when the existing rules will be extended, as well as the impact of this delay on the rest of the legislative package.

### Antitrust: Digital Markets Act

At the same time the darling of the Commission and the favorite punching bag of the Big Tech, the Digital Markets Act ("DMA") passed its final legislative hurdle in July, when it received final approval from ministers of the European bloc.

While the ink was still fresh, the DMA's first effects started to show. Mid-September, the Commission announced that it was already looking to hire a chief technology officer to advise on competition. The new hire will have their job modelled on the mandate of



the chief economist. Overall, the new DMA team will comprise 80 officials, with the workload due to increase in 2023, when the Commission will begin the formal gate-keeper designation process. Another uptake in workload will most likely take place in 2024, when the Commission will start reinforcing and monitoring the DMA obligations. Considering the current zero-growth policy in terms of staffing, the team will have a fair share on their plate.

The first effects start to show on the Big Tech side as well – according to Vice President Vestager, Amazon, Apple, Google and Meta may have to share planned changes to their business with consumers in dedicated workshops under new EU tech legislation.

### **Antitrust: Revision of Regulation 01/2003**

The revision of Regulation 1/2003 is one of the topics on the Brussels agenda, due to the potential that it would hold (if done right) for the legal community. In parallel to the public tender launched in April 2022, a public consultation was also opened, allowing the stakeholders to contribute to the shaping of the follow-up to Regulation 1/2003.

A few issues have already been flagged, particularly in the 2020 report of the European Court of Auditors, such as the fact that the Commission now handles lengthier and more complex investigations due to increasing volumes of data to be processed and the emergence of digital markets. The Commission's own capacities for monitoring of markets and own detection of cases were found to be affected by limited resources, while although cooperation with NCAs was good, certain aspects could benefit from improved coordination.

If we are to make 3 wishes, like the story goes, we would like to see a number of points being addressed in the revision of Regulation 1/2003, namely:

- Having a minimum standard of codification at ECN level for legal and professional privilege (“LPP”). In practice, the concept is frequently a source of ambiguities, especially since the scope varies from one Member State to another. This leads to friction between enforcement systems and the erosion of fairness to the undertakings under investigation.
- Amending the mandate of the Hearing Officer by extending it throughout the investigative phase of Commission inquiries. Here, we are thinking about the fact that undertakings currently have no address in a timely manner regarding irregularities in the conduct of inspectors during dawn raids. Getting the Hearing Officer involved would remedy the balance of the rights of defense.
- Rendering oral hearing a more efficient role in the investigative phase. Currently, oral hearings play a mostly formalistic role of “having the parties heard”. An idea would be to shift the rationale to having oral hearings similar to peer reviews, where the parties do more than repeat the arguments presented in their response to the statement of objections.



In addition to the public consultation, the Commission has launched a tender for an evaluation support study of EU antitrust enforcement framework. The study is intended to focus on topics such as the state of competition in the EU, particularly with regard to its globally active businesses, and how competition helps the bloc's economy.



**WHEN?** Staff working paper likely in mid-2024, but the public consultation runs until 6 October 2022. So if you have wishes to add to our list, you might want to hurry up. Otherwise, the Commission seems – somewhat – eager to listen to feedback from the antitrust community and you still might be able to get your points across informally.

### Antitrust: Informal Guidance Rules

The mechanism of the informal guidance has seen a wave of advocacy around it with this year's *rentrée* mainly due to the Commission's seeking feedback on its new draft text. The Commission is now on a tour to promote it, also in an effort to lighten its workload and following the success of a similar mechanism at national level in Member States such as the Netherlands.

So far, the informal guidance has actually never been used in practice. Rumor has it that the mechanism was not popular neither with the Commission staff nor with undertakings, mainly because of the strict conditions a request needed to satisfy in order to be examined by the Commission.

The text now on the table of the Commission seeks to soften the admissibility conditions and to simplify the handling of a request by limiting its assessment to a short fact-finding. It also adds an additional condition – the relevance of the request at EU level.

The Commission has engaged in an exchange of opinions with stakeholders in order to better adapt the current draft to the practical challenges encountered in the past when attempting to use the mechanism.



**WHEN?** The publishing an updated Informal Guidance Notice is scheduled before the end of 2022.

### Antitrust and Cartels: Crisis mode and cooperation

As you may recall, prior to its introduction and the transition to a self-assessment regime, companies had to notify agreements to the Commission to benefit from the exemption laid down in what is now Article 101(3) TFEU. Companies often required an informal exemption by way of a comfort letter to be able to defend its behavior in front of national competition authorities and courts. But with Regulation 1/2003, the era of formal exemptions and comfort letters came to an sudden end. But not forever – fast forward 20 years: to tackle the pandemic, the Commission decided to re-introduce and issue two comfort letters, which provided businesses with guidance on what form of coordination is allowed with a view to increasing supply and the production of urgently needed vaccines.



Unfortunately, we seem to schlep from one crisis to another and to add insult to injury, the pandemic is now topped off by the energy crisis. So will a similar form of cooperation to manage the energy supply and mitigate the effects of price surges be allowed, and will competition authorities provide guidance to that end? First answers are already coming in: On 6 September 2022, the German Federal Cartel Office (“FCO”), under close cooperation with the European Competition Network, allowed a one-time, temporary cooperation between sugar producers. Within the project, the participating producers aim to provide each other with production capacities in case of a gas supply shortage in order to avoid a sudden production halt. According to the FCO, given the extraordinary circumstances, the positive effects of such cooperation on consumers outweigh its negative effects and is thus in line with competition law.

And the Commission? Is so far silent on crisis cooperation, but that might change soon: In the context of the EU Energy Platform, which aims to ensure the security and diversification of gas supply, governments and businesses are currently discussing some sort of joint purchasing mechanisms. While details are not yet public, the Commission was quick to comment that this must be “*set up and implemented in a way that fully complies with competition law*”. So we hope that the Commission will follow the FCO’s example and use that – or another – chance to provide businesses with specific guidance on what form of cooperation is allowed in the current crisis on a European level. Whether the Commission is however willing to do so beyond individual cases and whether it might issue publicly available comfort letters to that end, as done in the Covid crisis, remains to be seen.



**WHEN?** Hard to tell. The Commission is yet to act – but, if need be, it might be worthwhile to reach out and discuss the projects with the Commission’s services. In the Covid crisis, the Commission was particularly open to discuss such issues with business associations (which was also the case with the FCO in the sugar cooperation).

Instead of our usual sign-off, we invite you to come back tomorrow – same place, same time – for our second instalment of *La Rentrée*, this time looking into Merger Control. *A demain!*

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